

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HAROLD and SALLY DEGENHART,

Plaintiffs,

v.

AIU HOLDINGS, INC., (f/k/a AIG),  
presently known as CHARTIS, INC.; and  
AIU INSURANCE COMPANY,

Defendants.

Case No. C10-5172RBL

ORDER REGARDING DEFENDANTS'  
MOTION TO DISMISS AND/OR  
STRIKE PLEADING PURSUANT TO  
FED. R. CIV. P. 12

THIS MATTER comes before the Court on dual motions to dismiss various claims in the Complaint pursuant to Fed. R. Civ. P. 12. The first motion seeks a dismissal of the Class Action Complaint [Dkt. #28] citing lack of standing and failure to state a claim under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The second motion asks the Court to strike Class Allegations pursuant to Fed. R. Civ. P. 12(f) [Dkt. #29]. The Court has reviewed the materials for and against the motion and has heard oral argument of counsel. For the reasons that follow, the motions are **GRANTED IN PART AND DENIED IN PART.**

## FACTS

On October 30, 2007, plaintiffs' vehicle was damaged in a collision with an uninsured motorist. The estimate to repair the vehicle was \$14,924.94. Plaintiffs' insurance policy issued by AIU Insurance included coverage for property damage caused by an underinsured motorist (UIM). A claim was made to AIU and AIU paid the cost of the repairs under the UIM provisions of the policy. Shortly thereafter plaintiffs filed this lawsuit, claiming that their vehicle suffered "diminished value" as a result of the accident and that the AIU policy entitles plaintiffs to be compensated for such damage. They seek to represent a nationwide class of all AIU Insurance insureds who allegedly were not paid for "diminished value" following physical damage to their vehicles caused by underinsured motorists. Plaintiffs assert claims for (1) breach of their insurance contract, (2) declaratory relief, and (3) injunctive relief.

## ANALYSIS

### **I. Plaintiffs Lack Standing to Sue Defendant Chartis.**

To establish Article III standing, plaintiffs must show that they (1) suffered an injury in fact that is (2) fairly traceable to the alleged conduct of the defendant, and that is (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In their complaint, plaintiffs asserted claims against AIU Holdings, Inc. (formerly known as AIG), presently known as Chartis, Inc. and AIU Insurance Company. The company that issued the subject policy, evaluated the subject claim, and paid for the repairs was AIU, not Chartis. Chartis is a holding company and plaintiffs make no claim in their complaint that Chartis participated in the decisions, or in setting policies leading to the decisions, allegedly causing plaintiffs' injury. In the absence of such an allegation, plaintiffs cannot fairly argue that their injuries are fairly traceable to any conduct of Chartis. Similarly, because there is no dispute (claim) there is no reason to apply the "juridical link" exception that applies where there is "some type of legal relationship which relates all defendants in a way that would make single resolution of a dispute preferable to a multiplicity of similar actions." *Leer v. Washington Educ. Ass'n.*, 172 F.R.D. 439,

1 447 (W.D. Wash. 1997). As was true in *Shin v. Esurance Ins. Co.*, 2009 WL 688586 (W.D. Wash. 2009)  
2 this Court refuses to embrace the notion that all related companies may be haled into Court for the actions  
3 of one of those interrelated but distinct companies, merely because they may have agreed on common  
4 practices.  
5

6 Defendants' motion to dismiss plaintiffs' claims against Chartis is **GRANTED**. The motion for  
7 leave to take discovery and amend the complaint to allege additional facts and/or to join additional parties  
8 is **DENIED**.

9 **II. Plaintiffs Lack Standing to Bring Mischaracterization Claims.**

10 In their complaint, plaintiffs allege, on information and belief, that AIU sometimes  
11 mischaracterizes what is properly a UIM claim as a claim under its collision or comprehensive liability  
12 provisions. Such a practice, if it occurred, would cause damage to an insured because claims under  
13 collision or comprehensive general liability provisions routinely have higher deductibles and accidents so  
14 classified impact the insured's experience rating making future premium calculations higher. Plaintiffs  
15 acknowledge that their claim was not mischaracterized. It was handled under the UIM provisions of their  
16 AIU policy.  
17

18 Plaintiffs argue that the issue is a "typicality" inquiry, normally addressed at class certification,  
19 and that it is therefore not properly before the Court on a motion to dismiss. They assert that class  
20 members whose UIM claims were mischaracterized were victims of the same wrongful claims estimating  
21 practices, giving rise to identical legal claims for which plaintiffs and class members seek the same legal  
22 remedies. *See Hicks v. Morgan Stanley & Co.*, 2003 WL 21672085, at \*5 (S.D. N.Y. July 16, 2003).  
23 Even in a class action, "constitutional standing requirements [must be] satisfied before proceeding to the  
24 merits." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9<sup>th</sup> Cir. 2007).  
25

26 In fact, plaintiffs' mischaracterization claims do not arise from the same conduct as their  
27 diminished value claims, nor do they involve the same legal theories. Plaintiffs are free to seek class  
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1 representative status for AIU insureds who were improperly denied diminished value damages, whether  
2 the claim was handled under collision, comprehensive general liability or UIM provisions of the AIU  
3 policy. They do not, however, have standing to make a claim, as a class representative or otherwise, for  
4 damages arising from increased deductibles or adverse ratings caused by mischaracterization of the  
5 claims of others. They suffered no such loss and lack standing to assert the claim. A proposed class  
6 representative may not assert a litany of claims against a defendant merely because the plaintiff has  
7 standing for one such claim. *Shin* 2009 WL 688586 at \*4. Defendants' motion to dismiss plaintiffs'  
8 mischaracterization claims for lack of standing is **GRANTED**. Plaintiffs' request for leave to amend to  
9 add additional plaintiffs is **DENIED**.

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11  
12 **III. Defendants' Motion to Dismiss and/or Strike Plaintiffs' Declaratory Judgment Claims is**  
13 **Premature.**

14 Defendants seek to dispatch plaintiffs' claim for Declaratory Relief by arguing that it is  
15 duplicative of their breach of contract claim for which they seek damages. They point out that the  
16 declaratory relief plaintiffs seek merely requires a process by which their damages and those of class  
17 members are determined and paid. Specifically, plaintiffs ask this Court to order AIU to reevaluate prior  
18 claims, assess diminished value loss and pay that amount to each insured. This process mirrors the relief  
19 plaintiffs seek in their breach of contract claim: "reassessment of their claims for diminished value and  
20 equitable compensation or, alternatively, damages for receiving less than they had contracted for."  
21 Complaint, ¶7.7 [Dkt. #1].

22  
23 While a plaintiff may plead claims in the alternative in certain situations, there is Ninth Circuit  
24 authority allowing the Court to dismiss a declaratory relief cause of action when it only seeks a  
25 declaration of defendants' liability for damages which are sought by other causes of action. *See Swartz v.*  
26 *KPMG LLP*, 476 F.3d 756, 766 (9<sup>th</sup> Cir. 2007). The relief sought by defendants, if granted, would not  
27 alter the course of this litigation in any material respect. Discovery issues would not change and issues of  
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1 class certification would remain the same. The Court sees neither benefit nor prejudice to any party  
 2 regardless of its decision on this issue. As a matter of simple case management the Court **DENIES**  
 3 defendants' motion to dismiss the declaratory judgment claims **WITHOUT PREJUDICE** to reassert the  
 4 motion at a subsequent time when the outcome of this issue matters.  
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6 **IV. Defendants' Motion to Dismiss and/or Strike Plaintiffs' Claim for Injunctive Relief is**  
 7 **Premature.**

8 Defendants seek to have claims for injunctive relief dismissed because remedies available at law  
 9 are adequate to compensate for plaintiffs' alleged injury. *See eBay, Inc. v. Merc Exchange, L.L.C.*, 547  
 10 U.S. 388, 391 (2006). Defendants seek to have the class action claims for injunctive relief stricken under  
 11 Fed. R. Civ. P. 12(f) also because plaintiffs predominantly seek damages in their complaint. As with the  
 12 attack on the Declaratory Relief claims, defendants' motion here has no current impact on the litigation  
 13 whatsoever. The ramp-up to the class certification motion will not be affected at all. Not one extra hour  
 14 of time will be spent by either party. The Court may have discretion to dismiss or strike the claim at this  
 15 early juncture but it would be unwise to do so. The motions to dismiss and/or strike the individual and  
 16 class claims for injunctive relief are **DENIED WITHOUT PREJUDICE**.  
 17

18 **V. Plaintiffs Present a Viable Claim for Diminished Value Damages Under the AIU Policy.**

19 The core issue in this case is whether plaintiffs are entitled to diminished value damages under the  
 20 facts and circumstances present here. Given the repair option chosen by AIU, the pertinent provisions of  
 21 the subject policy are as follows:  
 22

23 Subject to the Underinsured Property Damage limit of liability stated on  
 24 ***your Declaration Page***, if you pay the premium for Underinsured Motorists  
 25 Property Damage Coverage, *we* will pay for ***property damage*** caused by an  
 26 ***auto accident*** which an ***insured*** is legally entitled to recover from the  
 27 ***owner*** or operator of an ***underinsured motor vehicle***.

28 The Policy also provide that "C. ***Property damage*** means injury to or  
 destruction of the property of an ***insured***."

Further, the Policy states that AIU Insurance's liability is limited as follows:

**C. Property Damage Limit of Liability** – Our Limit of Liability under this **Part C** for Property Damage to a covered auto from any one *accident* is the lowest of:

• • • •

3. The amount needed to restore the covered auto to its pre-loss condition, reduced by the applicable deductible;

Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990). Review is limited to the content of the complaint [and properly incorporated documents], and all allegations of material fact must be taken as true, and construed in the light most favorable to the non-moving party. *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9<sup>th</sup> Cir. 1996).

In Washington, insurance policies are construed as contracts. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash.2d 165, 171 (2005). A court must consider an insurance policy as a whole and give it a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Id.* If the language of an insurance policy is clear and unambiguous, the Court must enforce the policy as written; a Court may not modify it or create ambiguity where none exists. *Id.*

UIM coverage policies are evaluated to ensure that statutorily mandated coverage is “neither whittled away nor eroded.” *Greengo v. Pub. Employees Mut. Ins. Co.*, 135 Wash. 2d 799, 806 (1998). The UIM statute will not, however, be interpreted in a manner that would unduly impair the parties’ rights to contract freely. *Daley v. Allstate Ins. Co.*, 135 Wash. 2d 777 (1998).

1 The UIM statute requires that issuers of automobile insurance policies offer UIM coverage

2 For the protection of persons insured thereunder who are legally  
3 entitled to recover damages from owners or operators of  
4 underinsured motor vehicles, hit-and-run motor vehicles, and  
5 phantom vehicles because of bodily injury, death, or property  
6 damage resulting therefrom. . . .

7 RCW 48.22.030(2). The statute further provides:

8 Property damage coverage required under [RCW 48.22.020(2)] shall  
9 mean physical damage to the insured motor vehicle unless the policy  
10 specifically provides coverage for the contents thereof or other  
11 forms of property damage.

12 RCW 48.22.030(3).

13 While the source of the obligation to offer UIM is statutory, the scope of the coverage is  
14 contractual, subject only to the minimum coverage requirements set forth in the UIM statute. The UIM  
15 statute establishes a floor, but not a ceiling for UIM coverage. *See Mansker v. Farmers Ins. Co. of Wa.*,  
16 W.D. WA. Cause No. C10-511JLR.

17 With that contractual and statutory background, plaintiffs complain that AIU did not pay them  
18 (and presumably thousands of other insureds) for diminished value suffered as the result of an accident  
19 with an underinsured motorist. In their complaint, plaintiffs do not define what they mean by diminished  
20 value. The term has meant different things to different people over the years. In some cases, it is referred  
21 to as Inherent Diminished Value. In those cases, and others, the concept of diminished value is broad  
22 enough to include stigma damage which refers to the taint that may reduce a vehicle's value due to the  
23 perception that because of an accident it may have residual problems despite being fully repaired. *See*  
24 *Allgood v. Meridian Security Ins. Co.*, 836 N.E.2d 243, 248 (Ind. 2005); *Hovenkotter v. Safeco Ins. Co.*,  
25 2010 WL 3984828 \*1, 7 (W.D. Wash. 2010).

26 In Washington, stigma damages are not considered diminished value. Rather, diminished value  
27 loss arises when a vehicle sustains physical damage in an accident, but due to the nature of the damage, it  
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1 cannot be fully restored to its pre-loss condition. The remaining physical damage, such as weakened  
2 metal which cannot be repaired results in diminished value. *See Moeller v. Farmers Ins. Co. of Wa.*, 155  
3 Wash. App. 133 (Div. 2, 2010).

4  
5 The UIM statute requires insurers to offer UIM coverage for insureds who are otherwise entitled  
6 to damages because of property damage resulting from an accident caused by an underinsured motorist.  
7 To trigger entitlement to coverage, physical damage to the vehicle must occur. Although the parties may  
8 contract for greater benefits, the UIM statute requires that coverage at a minimum, be provided for the  
9 physical damage sustained by the vehicle. RCW 48.22.030(3).

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11 The contract between the parties gave AIU the option to limit its liability to “the amount needed to  
12 restore the covered auto to its pre-loss condition.” Defendants argue that if some forms of physical  
13 damage remain after all repairable damage has been fixed, then by the terms of the policy, coverage is not  
14 extended. The argument is not consistent with the fair, reasonable, and sensible construction the average  
15 purchaser of insurance would give to the policy. Neither does it meet the minimal requirements of the  
16 UIM statute.

17  
18 Given the definition of diminished value adopted by the *Moeller* court, post-repair residual  
19 physical damage to an accident vehicle represents diminished value. Because it is actual physical  
20 damage, the UIM statute requires that it be covered. The plain meaning of the applicable AIU policy  
21 provisions properly provides coverage for such damage. The restoration of a covered auto to its pre-loss  
22 condition requires that an insured be compensated for all physical damage incurred, to include, for  
23 example, unrepaired dents, bends or stress to the vehicle’s structure, and damage to the function or  
24 appearance of the vehicle. *See Scammell v. Farmers Insurance Exchange*, No. 01-2-13321-2 (Pierce  
25 County Superior Court). While this list is not exhaustive, the definition of diminished value in  
26 Washington does not include stigma damage: metaphysical loss attributable to the fear that unproven  
27 damage remains following a repair of the vehicle. Coverage for such damage is not required by the UIM  
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1 statute and is not provided for by the AIU policy. In short, residual physical damage is covered under the  
2 AIU policy. Stigma damage is not.

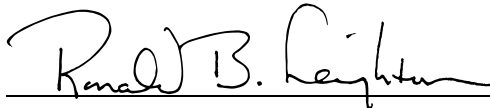
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4 At trial, plaintiffs will be required to demonstrate that their vehicle was physically damaged even  
5 after the repair authorized by AIU. The need for expert testimony makes the Court skeptical that this is a  
6 case where class action is superior to other available methods for fairly and efficiently adjudicating the  
7 controversy. Fed. R. Civ. P. 23(b)(3). Defendants argue (and the Court tends to agree) that the kind of  
8 showing required under Washington law to establish diminished value makes group generalizations about  
9 the fact of injury or the amount of damage inappropriate. They also urge the Court to focus on the  
10 differences between UIM statutes from state to state and the different definitions given the term  
11 “diminished value” from one state to another and to reject class certification here and now. The Court  
12 will, however, decline defendants’ suggestion that Class Certification be denied at this early stage of the  
13 litigation. Plaintiffs will have the opportunity to conduct discovery and to propose certification of some  
14 class that could potentially be tried collectively notwithstanding differences in state laws and the obvious  
15 problems of proof identified by the Court. Plaintiffs have sufficiently alleged facts that support a  
16 plausible legal theory. Defendants’ motion to dismiss for failure to state a claim is **DENIED**.  
17 Defendants’ motion to strike plaintiffs’ class allegations because individualized issues necessarily  
18 predominate is likewise **DENIED**. The Court will deal with that issue if and when a motion for  
19 certification of the class is presented to the Court.  
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### 22 CONCLUSION

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24 The defendants’ Motion to Dismiss Claims Against Chartis [Dkt. #28] is **GRANTED**. The  
25 motion to dismiss mischaracterization claims [Dkt. #28] is **GRANTED**. The Motions to Dismiss Claims  
26 for Declaratory Relief and for Injunctive Relief [Dkt. #28] are **DENIED WITHOUT PREJUDICE**. The  
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1 Motion to Strike Class Allegations for Injunctive Relief [Dkt. #29] is **DENIED WITHOUT**  
2 **PREJUDICE.** The Motion to Dismiss Complaint for Failure to State a Claim [Dkt. #28] is **DENIED.**  
3 The Motion to Strike Class Allegations Pursuant to F.R.Civ. P. 23(b)(3) and 12(f) is **DENIED.**  
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5 Dated this 26<sup>th</sup> day of November, 2010.  
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9 RONALD B. LEIGHTON  
10 UNITED STATES DISTRICT JUDGE  
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